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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

92-265

Honorable Rick Boucher
House of Representatives
2245 Rayburn House Office Building
Washington, D.C. 20515

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Dear Congressman Boucher:

Thank you for your letter regarding implementation of the programming access provisions of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).

As you discussed in your letter, Section 19 of the 1992 Cable Act adds new Section 628 to the Communications Act of 1934, as amended, to prohibit unfair or discriminatory practices in the sale of video programming. The expressed intent of this provision is to foster the development of competition to cable systems by increasing other multichannel video programming distributors' access to programming. In our First Report and Order in MM Docket No. 92-265, adopted April 1, 1993, and released April 30, 1993, the Commission adopted implementing regulations for Section 19. In so doing, the Commission endeavored to follow the plain language of the statute, as informed by the legislative history, and to effectuate its reading of Congressional intent based on its own judgement and expertise, in light of all comments received.

In particular, the Commission concludes in the First Report and Order that price discrimination will be deemed to occur if the difference in the prices charged to competing distributors is not explained by the factors set forth in the statute, which generally involve (1) cost differences at the wholesale level in providing a program service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability and character; and (4) differences in the way the programming service is offered. The Commission concluded that these factors will permit sufficient latitude for legitimate and justifiable pricing practices common to a dynamic and competitive marketplace. While any differential in the price paid by one distributor as compared with that paid by its competitor may form the basis for a complaint, we will impose a higher burden on programmers where the price difference at issue exceeds either five percent or five cents per subscriber, whichever is greater.

The First Report and Order also concludes that complainants alleging violations of specific prohibitions of Section 628 regarding discrimination, exclusive contracts or undue influence will not be required to make a threshold showing of harm. The First Report and Order states the Commission's belief that Congress has already determined that such violations result in harm. The Commission also concludes, however, that the plain language of the statute requires complaints filed pursuant to the general prohibitions of Section 628(b) regarding unspecified unfair practices must demonstrate that an alleged violation had the purpose or effect of hindering significantly or preventing the complainant from providing programming to subscribers or consumers.

In addition, the First Report and Order adopts a streamlined complaint process. The Commission's rules will encourage programmers to provide relevant information to distributors before a complaint is filed with the Commission. In the event that a programmer declines to provide such information, it will be sufficient for a distributor to submit a sworn complaint alleging, based upon information and belief, that an impermissible price differential exists. With respect to complaints alleging price discrimination, the burden will be placed on the programmer to refute the charge by presenting evidence of the actual price differential and its justifications for that differential. The complaining distributor will then have an opportunity to reply.

With respect to exclusive contracts, the First Report and Order determines that exclusive arrangements between vertically integrated programmers and cable operators in areas not served by a cable operator are illegal and may not be justified under any circumstances. The First Report and Order also holds that exclusive contracts in areas served by cable (except those entered into prior to June 1, 1990) may not be enforced unless the Commission first determines that the contract serves the public interest. These determinations will be made on a case-by-case basis, following the five public interest factors set out in the statute.

For your reference, I have enclosed a copy of the press release, which includes a detailed summary of the Commission's action in this proceeding. Thank you for your interest in this matter.

Sincerely,

James H Quello

James H. Quello
Chairman

Enclosure

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PRB
92-235
PV
JHQ

Congress of the United States
Washington, DC 20515

March 23, 1993

1469

The Honorable James H. Quello
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-265

Dear Chairman Quello:

We are writing to express our views concerning the Notice of Proposed Rulemaking regarding the program access provision (section 19) of the Cable Television Consumer Protection and Competition Act of 1992. We would like to thank you and the Commission staff for your cooperation in arranging meetings between members of our staffs and the Commission's staff to discuss in detail the Commission's implementation of that provision. This letter is intended to highlight certain concerns that were raised in those meetings.

In crafting the Cable Act, Congress recognized the unfair advantages that vertically integrated program suppliers have because of their ability to favor their affiliated cable operators over nonaffiliated cable operators and other multichannel video programming distributors, such as wireless cable and DBS. The purpose of section 19 was to prohibit this type of favoritism by making it unlawful for program vendors in which a cable operator has an attributable interest to refuse to sell programming to cable competitors or to discriminate with respect to prices, terms or conditions in making such sales. The continuation of these discriminatory practices is antithetical to Congress' goal of fostering the growth of emerging video distribution technologies.

Section 19 was the most intensely examined and vigorously debated provision of the Cable Act. The statutory language of the provision is clear, and in implementing section 19 the Commission should use a strict interpretation of that language.

The statutory language of section 19 provides that price differences are _per se_ discriminatory unless a _cable programmer_ can show that such price differences meet one of the four specific exemptions set forth in subsection (c)(2)(B). A cable competitor makes a _prima facie_ case by showing price discrimination; it is not required by the statute to make any additional showing of harm. After a cable competitor establishes a <u>prima</u> <u>facie</u> case, the burden of proof shifts to the vertically integrated programmer or cable operator who is alleged to be in violation.

The language of section 19 does not permit any other method of analysis of price discrimination. Nor does it permit any other method of allocating the burden of proof. Congress recognized that cable competitors do not have access to other than the most basic information about what they are being asked to pay as compared to what affiliated cable operators are paying for identical programming. Thus, the burden of proving that the apparent price disparity is somehow permissible under the terms of the statute must rest with the vertically integrated programmer, the party with access to all of the necessary pricing information, such as documentation of actual differences in the cost of delivery or transmission of the programming in question.

With regard to exclusive contracts, the provisions of section 19 are likewise clear. In areas not served by a cable operator as of October 5, 1992, exclusive contracts or similar arrangements which would prevent a cable competitor from distributing programming are expressly prohibited without exception. In areas served by a cable operator as of October 5, 1992, exclusive contracts are prohibited unless the Commission determines that a particular contract is in the public interest pursuant to the factors enumerated in subsection (c)(4). Public interest determinations should be made on a case-by-case basis in a declaratory proceeding prior to the parties entering into such an exclusive contract. The burden of proving that such a contract is in the public interest should be on the parties

We all want competition to thrive in the video programming marketplace. Issuing strong access to programming regulations will be the single most important action the Commission can take to foster that competition. We urge you to fulfill the goals of the statute when promulgating the section 19 regulations.

Sincerely,